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Nos. 04-1244, 04-1352

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In the

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF ALABAMA, DELAWARE, KANSAS, MICHIGAN, OHIO, SOUTH DAKOTA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Seventh Circuit correctly held, in conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act, 18 U.S.C. § 1951(a), can be read to punish acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether this Court should again grant certiorari to resolve the deep and important intercircuit conflict over whether injunctive relief is available in a private civil action for treble damages under RICO, 18 U.S.C. § 1964(c).*

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* These questions are taken verbatim from the petition in *Scheidler v. National Organization for Women, Inc.*, No. 04-1244.

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INTEREST OF AMICI

Traditionally, courts have read the federal Hobbs Act to permit criminal prosecution (or civil liability) only in cases involving either robbery or extortion. In the decision below, the Seventh Circuit broke ranks and held that, in addition to those two discrete crimes, the Hobbs Act can be construed to punish *any* act or threat of physical violence to *any* person or property that in *any* way affects interstate commerce. The States' interests in this case are two-fold. First, the States have a compelling interest in resisting the federalization of the criminal law, an area "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). Second, the States have a keen interest in ensuring that their officers and employees, who necessarily engage in acts and threats of physical violence to persons (as in day-to-day police work) and property (as when condemning blighted buildings) are protected against over-expansive constructions of the Hobbs Act and its fellow traveler, RICO.

STATEMENT

It's worse than we thought.

In briefing this case several years ago, the State of Alabama argued that, by essentially ignoring the requirement that property be "obtain[ed]" to trigger Hobbs Act liability for extortion, the Seventh Circuit had expanded the Hobbs Act's (and, by extension, RICO's) scope in a way that was "truly breathtaking – and troubling." Br. for the State of Alabama as Amicus Curiae at 10, *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003) (Nos. 01-1118, 01-1119) (cert. stage). By an 8-1 margin, this Court agreed and held that it is not enough for Hobbs Act purposes that an individual be induced "'to give up' property rights"; rather, a party liable for extortion under that Act must not only deprive his victim of her property but also acquire – in the words of the statute, "obtain[]" – that property for himself. *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 400-09 (2003). Any other reading, this Court said, would constitute

an "unwarranted expansion" of the Hobbs Act's definition of extortion. *Id.* at 402.

Now, on remand from this Court's reversal, the Seventh Circuit has opened up another, more problematic can of worms. The court of appeals has now suggested (contrary to existing understanding) that robbery and extortion are *not* the only two offenses that can give rise to Hobbs Act liability. There is, the Seventh Circuit says, a third "way." Pet. App. 8a.[1] Specifically, that court has held that it may well be enough for a Hobbs Act prosecutor (or plaintiff) to show – without reference to any robbery or extortion – that another person has "commit[ted] or threaten[ed] physical violence to any person or property" in a way that somehow "obstruct[s], delay[s], or affect[s] commerce." Pet. App. 26a-29a (panel); Pet. App. 6a-15a (rehearing). Thus, the Seventh Circuit left open to the district court the question whether four claimed "acts or threats of physical violence" – acts freestanding in the sense that they bear no relation to any alleged robbery or extortion – could alone support Hobbs Act (and RICO) liability. *See* Pet. App. 27a-28a.

The Seventh Circuit's construction of the Hobbs Act this go around is even more "breathtaking" and "troubling" than before. Last time, at least, the court of appeals' expansion of the Hobbs Act was limited to the term "extortion"; a deprivation of property, that court said – even without an accompanying acquisition – was sufficient to constitute Hobbs Act extortion. (Again, we disagreed, as did this Court.) This time, it seems to us, the stakes are much higher. This time, the Seventh Circuit is not just tweaking or massaging an *existing* basis for Hobbs Act liability – "extortion" means this, or "robbery" means that. This time, the Seventh Circuit has opened up an *entirely new* avenue – a third "way" – to Hobbs Act liability. The Seventh Circuit's decision here leaves open the possibility that neither

[1] All "Pet. App." references are to the appendix submitted with the petition in *Scheidler v. National Organization for Women*, Inc., No. 04-1244.

extortion nor robbery is a necessary ingredient of a Hobbs Act violation, at all – that it is enough for a person simply to commit or threaten violence (either to another person or to property) in any way that affects interstate commerce.

That startling conclusion, we respectfully submit, warrants this Court's immediate attention.

REASONS FOR GRANTING THE PETITION

Before getting into the guts of the Hobbs Act issue, it is worth noting briefly that there is a good argument to be made that this Court's decision in *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003) – which, for ease of analysis, we will call *Scheidler II*[2] – has already resolved that issue, and that, in fact, by keeping this case alive the Seventh Circuit has contravened this Court's mandate. Concluding its opinion in *Scheidler II*, this Court held that

> Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. §1964.

537 U.S. at 411.

On its face, that statement of the Court's holding is hard to quibble with – it is, it seems to us, an unambiguous directive to the Seventh Circuit to (1) reverse the judgment against petitioners, (2) vacate the injunction, and (3) close the case. While we leave the details of this argument to the petitions themselves (*Scheidler* Pet. at 12-17; *Operation Rescue* Pet. at 8-13), we will say briefly before moving on that it would certainly appear that "the Seventh Circuit has now

[2] *"Scheidler I"* being *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

decided" – in the teeth of this Court's own decision – "that 'all' of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the 'judgment that petitioners violated RICO' was *not* necessarily reversed, and that the injunction might *not* need to be vacated after all." *Scheidler* Pet. at 12 (emphasis in original).

If it is determined, as petitioners have argued, that the Seventh Circuit has ignored the holding of *Scheidler II*, this Court should summarily reverse.

I. This Court Should Clarify Confusion Over Whether the Hobbs Act Reaches Freestanding Acts or Threats of Physical Violence, Unconnected to Either Robbery or Extortion.

What troubles amici most about the Seventh Circuit's decision is not its seeming disregard for this Court's mandate; that is an issue primarily for the parties here. Our concern, instead, is with the Seventh Circuit's unprecedented construction of the Hobbs Act itself – and the implications of that construction for States and state officers.

A. The Circuits Are Divided Over Whether the Hobbs Act Reaches Freestanding Acts or Threats of Physical Violence.

In relevant part, the Hobbs Act provides as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a).

The Seventh Circuit posited "two possible interpretations of this language." Pet. App. 8a. "'First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or

extortion." *Id.* (quoting Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 142-43 (1994)). Alternatively, the court of appeals said, it might instead "'forbid[] threatening or committing physical violence in furtherance of a plan to "obstruct, delay, or affect commerce" (other than through robbery or extortion).'" *Id.* (quoting Bradley, *supra*, at 143). In other words, the Seventh Circuit summarized, the Hobbs Act lends itself to both a "two-way" interpretation – the two prohibited acts being robbery and extortion – and a "three-way" interpretation – under which, in addition to robbery and extortion, "physical violence" alone can support a Hobbs Act claim. *See id.*

The Sixth and Ninth Circuits have definitively rejected the so-called three-way reading. The Sixth Circuit, for its part, said that it could not "accept the government's view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce"; rather, that court held, §1951(a)'s "language and legislative history require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce *by extortion or robbery*." *United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975) (emphasis added). The Ninth Circuit was even less charitable: It described as "untenable" and "fatally flawed" the Government's view that "the Hobbs Act criminalizes any act of violence to person or property that has an effect on commerce, even if the alleged violent act had no connection to any executed or planned robbery or extortion." *United States v. Yankowski*, 184 F.3d 1071, 1072, 1073 (9th Cir. 1999).

Now, in stark contrast to the Sixth and Ninth Circuits' decisions, the Seventh Circuit has expressly held open the three-way interpretation as a viable reading of the Hobbs Act. Indeed, although the Seventh Circuit panelists repeatedly protested that they did not mean to prejudge the Hobbs Act issue, *see, e.g.*, Pet. App. 6a, 15a, their opinion does just that. As the *Scheidler* petition accurately observes, the Seventh Circuit's order on rehearing "devoted ten full pages to addressing – and criticizing – many of the arguments made in the rehearing petition for why the

Hobbs Act cannot and should not be read to punish freestanding act or threats of violence." *Scheidler* Pet. at 8. And as we will explain in some detail below (*see infra* at 18-20), the Seventh Circuit has left little doubt as to its view that a free-floating allegation of physical violence *can* give rise to Hobbs Act liability.

In implicitly endorsing the three-way reading of the Hobbs Act, the Seventh Circuit has created a circuit split and sown confusion about the Act's proper construction. This Court should step in to set matters straight.

B. The Seventh Circuit's "Three-Way" Interpretation of the Hobbs Act Is Untenable.

Amici respectfully submit that the Seventh Circuit is simply wrong in its assessment of the so-called three-way interpretation of the Hobbs Act. That Act's text, legislative history, and statutory structure, along with fundamental principles of federalism, combine to condemn the freewheeling three-way reading that the Seventh Circuit's decision so struggles to preserve.

1. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Text.

First, there is the Hobbs Act's plain language. Because a careful textual analysis is in order here, we set out that language again:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a).

The Seventh Circuit believed that "[g]rammatically, the text can be read either way" – that is, to support either the

two-way or the three-way interpretation – "without undue strain." Pet. App. 8a. We disagree. As a matter of grammar, the three-way interpretation of §1951(a) seems to us quite "strain[ed]." Reading the Act to make physical violence a stand-alone violation is worse than awkward: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce ... commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section ...." The transition between the preambular clause about "commerce" and the phrase "commits or threatens physical violence" just doesn't work. And, it should be noted, the difficulty cannot be alleviated by keeping the word "or" with the phrase "commits or threatens physical violence." While that might solve grammatical problems (allowing for a workable transition), it would have the effect, as well, of making the act of "obstruct[ing], delay[ing], or affect[ing] commerce" *itself* a stand-alone Hobbs Act offense – an interpretation that, to our knowledge, no one has endorsed.

The Seventh Circuit's three-way reading suffers from an additional textual flaw. The Hobbs Act's physical-violence clause applies only to one who "commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section.*" 18 U.S.C. §1951(a) (emphasis added). The italicized language seems quite clearly to refer back to something that has come before – something that constitutes the relevant "violation of this section." If, as the Seventh Circuit's opinion suggests, an act or threat of physical violence may *itself* constitute the relevant "violation of this section," then the physical-violence clause would be read to apply to anyone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to *commit or threaten physical violence to any person or property.*" That circular formulation, of course, doesn't make any sense.

Far and away the best reading of the Hobbs Act goes like this: At its core, the Act applies to any person who "in any

way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, *by robbery or extortion*." 18 U.S.C. §1951(a) (emphasis added). The two clauses that follow both refer back to that core prohibition. First, the Act targets anyone who "attempts or conspires *so to do*" – that is, attempts or conspires to obstruct, delay, or affect commerce by robbery or extortion. *Id.* (emphasis added). Second, and more immediately relevant here, the Act reaches anyone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of this section*" – that is, commits or threatens violence in furtherance of a plan to obstruct, delay, or affect commerce by robbery or extortion. *Id.* (emphasis added). Under this sensible and straightforward reading, §1951(a) entails (1) a core prohibition on robbery and extortion and (2) complementary prohibitions on (a) attempts and conspiracies to rob or extort and (b) acts or threats of violence associated with robberies and extortion.

2. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Legislative History.

The Hobbs Act's legislative history leads to precisely the same conclusion. Indeed, two separate pieces of legislative history expose the error of the three-way interpretation. First, there is the Anti-Racketeering Act of 1934, which this Court has called the "predecessor to the Hobbs Act." *United States v. Culbert*, 435 U.S. 371, 375 n.5 (1978). The Anti-Racketeering Act, as summarized by the Ninth Circuit in *Yankowski* (and as acknowledged by the Seventh Circuit here, *see* Pet. App. 11a-12a), provided that "[a]ny person who, in connection with or in any degree affecting trade or commerce (a) commits or attempts extortion of money, or (b) obtains property through extortion, or (c) *'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b),'* or (d) conspires with respect to (a),

(b) or (c) ... shall be imprisoned or fined." 184 F.3d at 1073 n.5 (quoting Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979) (emphasis added). That, at least as far as extortion is concerned, is very nearly exactly the prohibition expressed by the plain language of the present-day Hobbs Act: Physical violence is not itself the object of the statute – extortion is – but only one means of accomplishing that object. The Seventh Circuit, conspicuously, had nothing to say about either the Anti-Racketeering Act or what it might spell for the three-way interpretation.

Second, there is the language of the Hobbs Act as originally enacted in 1946. The "fit" between the original Act (which we quote at length below) and the plain-language reading of the current version is remarkable:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946). The conclusion is unmistakable: The core prohibition (in the 1946 Act, Section 2) targets "robbery [and] extortion"; the complementary prohibitions against conspiracies (Section 3), attempts (Section 4), and physical violence (Section 5) do not stand alone but, rather, all refer back to the core prohibition. All of which, we submit, dovetails precisely with the best reading of the Hobbs Act as currently structured.

The Seventh Circuit acknowledged that, as enacted in 1946, the Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." Pet. App. 15a. But, the court said, it was not until 1948 that the Act "assumed its present form." *Id.* And while conceding that the 1948 revisions "were intended to be formal, stylistic changes," the Seventh Circuit supposed that it was "not beyond the realm of possibility that the revisers may have made certain substantive changes either advertently or inadvertently." *Id.* There are three fundamental problems with the court of appeals' reasoning in this respect, which we will mention briefly. First, if, as the Seventh Circuit admits, the 1948 changes were "intended" to be only formal and stylistic, then, by definition, any substantive changes could not have been "advertent," but must have been accidental, instead. *See, e.g., 7 Oxford English Dictionary* 770 (2d ed. 1989) (defining "inadvertent" to mean "unintentional"); *Random House Webster's College Dictionary* 658 (2d ed. 1997) (same). Second, whatever one's particular theory of statutory interpretation, the aim, all presumably agree, is to discern and enforce Congress' intent. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). If, as the Seventh Circuit acknowledges, Congress had no "inten[tion]" in 1948 to make substantive changes to the Hobbs Act, then none should be attributed. And, finally, as the *Scheidler* petition emphasizes, "this Court has long recognized the principle that it 'will *not* be inferred that the legislature, in revising and consolidating the laws'" – as it did with the Hobbs Act in 1948 – "'intended to change their policy, unless such intention *be clearly expressed*,'" which all acknowledge it was not here. *Scheidler* Pet. at 22 (quoting *United States v. Ryder*, 110 U.S. 729, 740 (1884)).

3. The "Three-Way" Interpretation Cannot Be Reconciled With the Structure of the Federal Criminal Code.

In addition to textual and historical problems, there are also at least two structural defects inherent in the three-way

reading. First, an interpretation of the Hobbs Act that makes any act or threat of "physical violence" – standing alone – a federal offense has the effect of rendering essentially superfluous a whole host of other, more specific, federal criminal statutes. Perhaps the clearest example is the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. §248, which, as Justice Stevens observed in *Scheidler II*, responds directly "to the concerns that gave rise to these cases." 537 U.S. at 417 (Stevens, J., dissenting). Specifically, as relevant here, the so-called FACE Act targets anyone who "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services." 18 U.S.C. §248(a)(3). Notably, though, the FACE Act prescribes relatively modest criminal penalties for violations: one year for a first offense and three years for subsequent offenses. *Id.* §248(b). By bluntly punishing essentially all "physical violence" (whether against persons or property) with 20 years in prison, the three-way interpretation of the Hobbs Act supplants the congressional compromise that the FACE Act presumably embodies.

And the FACE Act is only the most obvious casualty of the Seventh Circuit's overbroad reading. A host of federal criminal statutes would be effectively swallowed up by the three-way interpretation. Among them –

- 18 U.S.C. §32(a)-(b) (destruction of airplane);
- 18 U.S.C. §33(a) (destruction of motor vehicle);
- 18 U.S.C. §111(a) (assaulting a federal officer);
- 18 U.S.C. §844(i) (arson);
- 18 U.S.C. §1201(a) (kidnapping);
- 18 U.S.C. §1203(a) (hostage-taking);
- 18 U.S.C. §2119 (carjacking);
- 18 U.S.C. §2242 (sexual abuse); and
- 18 U.S.C. §2261(a) (domestic violence).

Some overlap among federal statutes is to be expected, of course. *Compare* 18 U.S.C. §1201(a) (kidnapping) *with* 18 U.S.C. §351 (kidnapping federal officer). But by broadly criminalizing "physical violence," the three-way reading of the Hobbs Act would consign a large chunk of the federal criminal code to the dustbin. This Court should reject a statutory construction that seems so obviously to "make nonsense out of the *corpus juris*." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." (quoting 2 J. Sutherland, *Statutory Construction* §5201 (3d ed. 1943)).

There is a second structural problem worth noting. The three-way interpretation would have the effect of expanding RICO's scope beyond all recognizable – and intended – boundaries. RICO, of course, includes violations of the Hobbs Act among its list of predicate crimes. 18 U.S.C. §1961(1). By contrast, RICO conspicuously does *not* include as a predicate crime any of the physical-violence-based offenses listed above. Thus, for whatever reason, Congress chose not to make arson, for instance, a RICO predicate offense. But under the three-way reading, a prosecutor or plaintiff could paper over that evident gap simply by dressing up an arson charge in Hobbs Act garb. No statute – and particularly not RICO – should be construed to be so manipulable.

One final RICO-related point: In its original incarnation, the bill that would become RICO defined "racketeering activity" sweepingly to cover "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." S. 1861, 91st Cong. §2(a) (1969). After the ACLU and Justice Department (among others) objected to the statute's breadth, the original "danger of violence to life, limb or property" formulation was scrapped in favor of the current delineation of specific offenses. *See* Brian J. Murray,

Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 697-99 (1999). By recognizing any act or threat of "physical violence" as a stand-alone Hobbs Act violation qualifying for predicate-act status, the three-way interpretation effectively reinstates the overbroad version of RICO that Congress expressly rejected.

4. The "Three-Way" Interpretation Cannot Be Reconciled With Fundamental Principles of Federalism.

Finally, in addition to text, legislative history, and statutory structure, there is the issue of federalism. The Seventh Circuit's sweeping reading of the Hobbs Act contravenes the most basic tenets of Our Federalism. The court of appeals flagged the federalism issue, but dismissed it casually by pointing to the presence in the Hobbs Act of "a jurisdictional element that limits its application to anyone who 'obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.'" Pet. App. 12a (quoting 18 U.S.C. §1951(a)). That jurisdictional hook, the Seventh Circuit said, alleviated any difficulty with the three-way interpretation "under the Supreme Court's Commerce Clause jurisprudence." *Id.*

There are two problems. First, by focusing exclusively on the Commerce Clause question (of which more below, *see infra* at 16-18), the Seventh Circuit overlooked a more immediate problem: Whether or not it is actually unconstitutional, the three-way interpretation of the Hobbs Act has the untoward effect of *federalizing essentially all violent crime*. Under that reading, anyone who "commits or threatens" any physical violence to "any person or property," and in so doing "in any way or degree" so much as "affects" commerce, is guilty of a federal offense punishable by 20 years. That construction runs headlong into this Court's precedent, as well as common sense.

This Court has recently reiterated that "[u]nder our federal system, the '"States possess primary authority for

defining and enforcing the criminal law,"'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982))), and, further, that "criminal law enforcement" is an area "where States historically have been sovereign," *id.* at 564; *see also id.* at 580 (Kennedy, J., concurring) (criminal law an "area of traditional state concern"). It has long been recognized, by contrast, that Congress has no power to "punish felonies generally," *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821), and does not enjoy anything approaching a general police power over citizens' health and safety, *see United States v. Morrison*, 529 U.S. 598, 618-19 & n.8 (2000).

Relatedly, and more recently still, this Court has reiterated that "[w]hen 'Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))). This clear-statement rule applies, the Court has explained, "when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in '"traditionally sensitive areas'" that '"affec[t] the federal balance."'" *Id.* at 543-44 (quoting *Will*, 491 U.S. at 65 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))). "In such cases, the clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Id.* at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464 (1991)).

In view of the presumption that the criminal law is the States' domain, there is "good reason" here – as in *Atascadero*, *Will*, *Gregory*, and *Raygor* – "to rely on a clear statement principle of statutory construction." *Id.* at 543. And whatever might be said (elsewhere) in its favor, the three-way interpretation of the Hobbs Act is *not* "clear" on

the face of the statute. Indeed, the Seventh Circuit itself admitted as much by observing that there are (in its view) "two possible interpretations of [the Hobbs Act's] language" and that §1951(a)'s text "can be read either way without undue strain." Pet. App. 8a. We, of course, happen to believe that the only permissible reading of the Hobbs Act forecloses the three-way interpretation. *See supra* at 6-8. But to the extent that any ambiguity exists, this Court's cases require that it be resolved against federalization and in favor of the traditional federal-state balance.

It is worth pausing briefly to consider the real-world implications of the three-way interpretation. Untethered from the traditional anchors of robbery and extortion, Hobbs Act liability would know no end. Couldn't almost any act or threat of physical violence – whether against a person or property – be said to "affect" commerce in some way, shape, form, or fashion? Assaulting a salesman, certainly; slashing another person's tires, probably. Shoplifters, pickpockets, and other petty thieves – all would presumably be guilty of *federal* offenses (indeed, felonies) under the three-way reading. How the federal courts could be expected to handle the ensuing crush of litigation is anyone's guess.

Nor, somewhat closer to home, is there anything to suggest an exemption to the freewheeling three-way construction for state and local government officials. Construed as the Seventh Circuit seemingly would allow, the Hobbs Act would sweep in a whole host of otherwise legitimate (and purely local) activities undertaken by States and state officers. Police officers, for instance, regularly and necessarily engage in acts or threats of physical violence; do all such acts that somehow "affect" commerce thereby give rise to federal Hobbs Act liability? Likewise, cities and States routinely condemn property and raze buildings, and thereby "commit ... physical violence" against "property"; those acts, too, all Hobbs Act violations? Jurisprudential concerns aside, the practical consequences of the Seventh Circuit's three-way interpretation are enough to condemn it.

There is a second, separate problem with the Seventh Circuit's treatment of the federalism issue. Despite the court of appeals' offhand dismissal, the three-way interpretation of the Hobbs Act does, in fact, present serious Commerce Clause questions. If, as under the traditional two-way interpretation, an act or threat of physical violence must be tied to a robbery or extortion, the Hobbs Act is presumably a valid exercise of Congress' Commerce Clause power – the reason being that robbery and extortion are both "economic" activities within the meaning of this Court's decisions in *Lopez* and *Morrison*. As emphasized in *Morrison*, in every case in which this Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611 (citing *Lopez*, 514 U.S. 559-60). As applied to robbery and extortion – both of which, by definition, involve the taking of valuable private property – there is every reason to believe that the Hobbs Act is constitutional.

But that same presumption would not apply were the Hobbs Act read to apply to any act or threat of physical violence – even those *not* tied in any way to robbery, extortion, or any other "economic endeavor." Just as neither gun possession, *see Lopez*, 514 U.S. at 567, nor domestic battery, *see Morrison*, 529 U.S. at 613, is in any sense an economic activity, an act or threat of "physical violence to any person or property," 18 U.S.C. §1951(a), is not in and of itself economic. Under the three-way interpretation, therefore, the Hobbs Act would likely fall victim to the principle that undergirds both *Lopez* and *Morrison* – that the Court has "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617.

The Seventh Circuit's assumption that all Commerce Clause problems melt away by virtue of "a jurisdictional element that limits [the Hobbs Act's] application to anyone who 'obstructs, delays, or affects commerce or the

movement of any article or commodity in commerce'" (Pet. App. 12a) rests on an oversimplification. To be sure, a jurisdictional hook is relevant to determining a statute's constitutionality under the Commerce Clause, but it is not alone conclusive. At most, this Court has said that a jurisdictional element "*may* establish," or "lend support to the argument," that a statute is within Congress' Commerce Clause power. *Morrison*, 529 U.S. at 612-13 (emphasis added). But to serve the proper narrowing function, a jurisdictional hook must actually "ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce." *Lopez*, 514 U.S. at 561. And not every jurisdictional element will fit that bill. *See, e.g., United States v. Maxwell*, 386 F.3d 1042, 1062 (11th Cir. 2004) ("Congress cannot guarantee the proper use of its authority by creating jurisdictional hooks that relate to interstate commerce in some way but fail in all cases to confine the scope of its regulation to Constitutional boundaries."); *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000) (same); *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (same). In the end, whether a statute includes a formal jurisdictional element or not, the test remains whether, as a substantive matter, Congress has observed "the distinction between what is national and what is local." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). As one court put the matter, if "uttering pretextual incantations evoking the phantasm of commerce" alone were sufficient, "Congress could federalize the crime of murder by inserting a statutory element that requires the prosecution to prove that the defendant ate a cheeseburger that traveled in interstate commerce." *Maxwell*, 386 F.3d at 1062.

To be sure, the Seventh Circuit's three-way reading of the Hobbs Act may not correlate precisely to the hypothetical "murder-with-cheeseburger" law. But the basic point remains: The three-way interpretation effectively federalizes all violent crime, and the rote insertion of a boilerplate "in any way ... affects commerce" clause does nothing to justify Congress' intrusion into an

area of traditional state concern. At the very least, under the principle that statutes should be construed to avoid constitutional problems, the Hobbs Act should be read, as the Sixth and Ninth Circuits have read it, to require a connection between an alleged act or threat of violence and an (economic) act of robbery or extortion. *See, e.g., Clark v. Martinez*, 125 S. Ct. 716, 724-25 (2005) (describing avoidance canon); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Far from avoiding constitutional doubt, the Seventh Circuit's decision actually invites it.

II. This Court Should Consider and Resolve the Hobbs Act Question Now.

Even given the circuit conflict and (we say) the obvious flaws in the so-called three-way interpretation, there is, we admit, a separate question whether this Court should grant certiorari now. The Seventh Circuit claimed, after all, not to be resolving the proper construction of the Hobbs Act. *See* Pet. App. 6a (panel opinion "left open the issue"); *id.* at 15a ("[W]e have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue ...."). Upon examination, however, that claim doesn't hold up. Whether purposefully or not, the Seventh Circuit's decision unmistakably endorses the three-way reading and, in so doing, commends that reading to other courts. As the *Scheidler* petition summarizes, the court of appeals "devoted ten full pages to addressing – and criticizing – many of the arguments made in the rehearing petition for why the Hobbs Act cannot and should not be read to punish freestanding acts or threats of violence." *Scheidler* Pet. at 8. Among other hints, the Seventh Circuit's opinion –

- rejects any suggestion that this Court foreclosed the three-way interpretation in *Scheidler II* (Pet. App. 9a-11a);
- cites to a fragment from *Stirone v. United States*, 361 U.S. 212 (1960), that, it says, "suggests that th[is] Court saw three distinct types of predicate acts in the statute" (Pet. App. 9a);
- essentially mocks, as "greatly overstat[ing] the case," "the doomsday scenario [petitioners] foresee if the Act is read to permit three independent predicate acts" (Pet. App. 12a);
- highlights what it views as the "difficulty [petitioners] face" in making out a plain-language argument (Pet. App. 14a);
- faults petitioners' reading as "leav[ing] an entire clause in the statute that has no meaningful function to perform" (Pet. App. 15a); and
- as noted above, finds it "not beyond the realm of possibility that the revisers [of the Hobbs Act in 1948] may have made certain substantive changes, either advertently or inadvertently," that embrace the three-way interpretation (Pet. App. 15a).

Having shown its cards, the Seventh Circuit purported to reserve judgment, saying that it would be "imprudent to resolve this problem of statutory interpretation at this stage of the litigation of this particular case." Pet. App. 15a. "Rather," the court of appeals said, "than launch such an ambitious project at the tail end of litigation that has been running for almost twenty years, we prefer a wait-and-see approach." *Id.* Accordingly, the court remanded the Hobbs Act issue to the district court for a determination "in the first instance." Pet. App. 28a.

With respect, the Seventh Circuit's reasoning has matters precisely backwards. *It is for the very reason* that this litigation "has been running for almost twenty years" that the question of the Hobbs Act's proper interpretation should be resolved *now*, and not kicked back down the judicial ladder for further percolation. This litigation has dragged on long enough. It would appear for all the world that this Court thought it had wrapped this case up in *Scheidler II* – only to have the Seventh Circuit unwrap it all over again.

See supra at 3-4. If there is anything that remains to be done here, this Court should go ahead and do it.

On the flip side, there is no good reason to "wait-and-see," as the Seventh Circuit suggests. First, while it is of course true that if any factual issues remained it might make sense to allow the district court to tackle them "in the first instance" (Pet. App. 28a), there are none. All that remains, as the Seventh Circuit itself admitted, is a "problem of statutory interpretation" (Pet. App. 15a) – a pure question of law with respect to which the district court has no particular advantage relative to appellate courts. Second, even granting that the Hobbs Act issue is, as the Seventh Circuit believed, "a complex one that deserves ... full briefing and full participation by all parties" (Pet. App. 16a), there will be plenty of time and space in this Court for interested parties to make their views known. Finally, to the extent the Seventh Circuit thought it important to have "input from the United States" concerning the Hobbs Act's reach, *Id.*, we have little doubt that the Solicitor General would exercise his prerogative to participate in this case as an amicus curiae (as he did, for instance, in *Scheidler II*).

The *Scheidler* petition has it exactly right when it says that the Seventh Circuit's "wait-and-see approach" has only "achieved the worst of all worlds by prejudging the outcome on remand yet prolonging already-protracted litigation by pretending to leave the district court with the first take on the [Hobbs Act] issue." *Scheidler* Pet. at 18. The question whether the Hobbs Act criminalizes every act or threat of physical violence, be it tied to a robbery or extortion or not, is ripe for review. There is nothing to gain, and plenty to lose, from waiting. This Court should grant the petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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